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THE COLLEGE OF LAW.—The College of Law opened in September with an attendance of ninety-one, or seven more than last year's enrollment. This increase is in the first-year class which numbers forty-four as compared with thirty-six in 1921.

There has been no change in the faculty since the last issue of the Quarterly.

The construction of the new law building is progressing steadily and it will be easily completed next summer. The opening of school in the new law building in the fall of 1923 will mark the forty-fifth year of the College of Law.

THE VALIDITY OF TRUSTS FOR ACCUMULATION UNDER THE RULE AGAINST PERPETUITIES.—Projects for the posthumous control of property seem to have a most profound appeal to some deep-rooted instinct in humanity. In a noticeably large number of cases it seems that men successful in amassing large accumulations of wealth become obsessed with the idea of perpetuating to utmost future time their amassed fortunes. Perhaps the iron-hearted discipline with which, as is popularly supposed, they apply their lives

to business, builds up in them, in time, what the newer psychologist might call a money "complex," and leads to their evaluation of the ultimate worth of their careers in terms of the size and permanency of their estates.

A favorite and time-honored plan for pecuniary self-perpetuation is that of creating, by will, trusts for accumulation. An historic instance of this was the famous Thellusson will. Peter Thellusson, who died in England in 1797, left an estate in trust, for accumulation, which was so vast that it was apparent that the economic and social consequences would be far-reaching and threatening to the realm. The courts upheld the validity of the will,[1] but the Parliament took action against the practice of creating such trusts.[2]

And even before the incidence of the Thellusson Case[3] the courts, without interposition of Parliament, had worked out the rule against perpetuities,[4] which has proved an effective bar to schemes providing for the devolution of property through successive generations of a designated family or families. This restrictive rule of law is, however, highly technical and, as laid down in the books, is confined in its application to a comparatively narrow field. It is not the purpose of the rule against perpetuities to prescribe a limit for the *duration* of estates, whether present or future, whether vested or contingent. A testator or grantor may, by his will in one case or by his deed in the other, make an arrangement providing for the holding in trust of certain property and the payment of the income therefrom to a given line of devisees or grantees forever, and yet escape the inhibitions of the rule against perpetuities.[5] The rule against perpetuities concerns itself only with the point of time at which estates are to commence. It prescribes an arbitrary period, measured from the time of their attempted creation, after which estates may not vest. Its name is therefore misleading. It would more properly be called the rule against remoteness of vesting.

A will speaks as of the date of the death of the testator. It may therefore, provide for the vesting or commencing after the testa-

[1] Thellusson *v.* Woodford, 4 Ves. 227 (1798), 11 Ves 112 (1805).

[2] St. 39 & 40 Geo. III, c. 98. For a discussion of this act see GRAY, RULE AGAINST PERPETUITIES, 3rd ed., Appendix B, §§ 686-727.

[3] For the history of the rule see GRAY, *supra*, §§ 123-200.

[4] The rule provides that no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of the creation of the interest. This short statement of the rule is, however, not unobjectionable. A. M. Kales, "Several Problems of Gray's Rule Against Perpetuities," 20 HARV. L. REV. 192.

[5] Such arrangement would, however, probably fall afoul of the independent but related rule against restraints upon alienation.

tor's death of any estate in the named devisees within the period which is prescribed, somewhat arbitrarily, by the rule. If, then, a testator devises his property to designated trustees, to take at once for investment and accumulation of income for a period however long, and the trust is so limited that legal title at once vests in the fiduciaries and the equity of *cestuis que trustent* vests simultaneously in the designated beneficiaries, the trust would not be at all repugnant to the rule against perpetuities simply by reason of the length of time prescribed for accumulation. An attempt to contrive a trust to arise or begin to function too remotely in time would, however, probably fall squarely within the purview of the rule. And if moreover, it is provided that the trustees shall take for accumulation and that, pending the accumulation, the intended beneficiaries thereof shall not have the equity of *cestuis,* or any other vested estate or interest in and to the trust *res* and its accruing income, and, for instance, shall only take a share of the estate, with its accretions, in case they survive the period of the trust, the case is different. In such case the situation of those ultimately to become the beneficiaries of the accumulation and the distributees of the *corpus* of the estate, with its accretions, is, pending the accumulation, somewhat peculiar. They would doubtless be entitled to appeal to the courts to see to it that the trustees observe strictly the requirements of the trust. Pending the trust, they have a contingent future interest in the estate and in the successive accretions thereto of such nature that when it vests, if ever, it will become absolute and indefeasible. Their interest, pending the accumulation, is therefore precisely the kind of interest which must vest at a not too remote point of time, to be valid under the rule against perpetuities.

Such was the situation in a recent West Virginia case.[6] In that case a testator provided for a trust which was essentially one for accumulation, and directed that the accumulation should continue until January 1, 1950. The testator died in 1920. The provision in question therefore required accumulation for a gross period of thirty years. In itself this would not have been invalid under the rule against perpetuities. But it was further provided that, pending the expiration of this period, the interest of he devisees should remain contingent and that upon the expiration of the designated period, the trust should be extinguished and the *corpus* of the estate, with its accumulations, should then and only then go abso-

[6] Pritchard *v.* Pritchard, 113 S. E. 256, (W. Va. 1922).

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lutely to such of certain designated beneficiaries as should survive to that time. This latter proviso was therefore one which made it possible that, under it, estates might commence or vest as late as thirty years after the death of the testator.[7]

The court correctly held this provision of the will invalid. For, as very ably set out in the opinion, the rule against perpetuities is not a rule of intention or construction. As has been frankly said by the leading authority upon the law of future interests, "Its object is to defeat intention."[8] But it only defeats an intention which is, under the rule, unlawful. And the rule is only applied after the work of construing the instrument and of arriving at the intent of the testator, or other user of the words being considered, is done. The intent is arrived at as if the rule did not exist and if the intent is found to be that estates provided for are to vest at a period too remote, the rule is remorselessly applied, defeating the intent.[9]

In the case mentioned it was correctly held that since the clear intent was to provide that the estate should vest absolutely in certain proportions in certain designated beneficiaries, at a period too remote under the rule, that portion of the will so providing must be held invalid. The most novel and interesting question presented by the case arises just here. If the trust for accumulation itself be valid,[10] but it is provided that at its expiration certain estates shall arise, or vest, which latter provision is invalid under the rule against remoteness, why not allow the trust itself to stand?

In another recent case the West Virginia Court had said:

> "Where it appears that a part of the testator's general scheme is to control the devolution of his estate for an unlawful period, no part of such scheme can be sustained, and such provision will be void in toto, even though the testator might have validly controlled the vesting of his estate in part, as indicated in such provision."[11]

But in that case the component provisions of testator's general scheme thus adverted to were not provisions creating a trust for accumulation, but provisions in the nature of conditional limita-

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[7] There is some authority to the effect that where no lives in being are mentioned in the limitation, the validity of which under the rule against perpetuities is being examined, the estate or estates in question must vest within a gross period of twenty-one years. Andrews *v.* Lincoln, 95 Me. 541, 50 Atl., 898 (1901).

[8] GRAY, *supra*, § 629.

[9] GRAY, *supra*, § 629.

[10] Validity only so far as the rule against perpetuities is concerned, is here meant.

[11] McCreery *v.* Johnston, Syl. pt. 8, 90 W. Va., 80, 110 S. E. 464, (1922).

tions. Hence that case, while cited to sustain the position taken in the case being considered, is not strictly in point in this connection. It is interesting to note that the question of the effect of a provision for a trust, the objects of which are accumulation and postponement of the vesting of absolute title in the devisees, had been suggested but had remained undecided:

> "If the main object of an executory trust were to create too remote limitations, so that apart from such object there remained nothing substantial to carry out, it is probable that the whole trust would fail, although there is no case so holding."[12]

These words appear in the 1915 edition of Gray's work and may be taken to establish that, when they were written, the question was still an open one. A somewhat casual search has failed to reveal any American case between that date and the decision now being considered which squarely raised and decided the effect of an attempt to create a trust for the purpose noted. And in that case there was, in the opinion of the court, such an attempt. There the trust for accumulation was made, as it were, a peg from which to suspend executory devises otherwise void. With the devises, the court holds, must also fall their support. The Court said:

> "The whole purpose of creating the trust was to preserve the property so that it might pass to those intended by the testator on the 1st day of January 1950, and inasmuch as that purpose is invalid the whole scheme by which it was intended to accomplish it will fall."[13]

It is believed that the solution of this very interesting and novel question thus worked out is quite correct from the legal view point. And it may be welcomed as one more blow at prolonged posthumous control of property.

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THE ANSWER IN EQUITY AS EVIDENCE IN WEST VIRGINIA.—The opinion has long prevailed, it is believed among the great majority of practitioners in West Virginia, that an answer in equity in this state is in no case evidence for the defendant. This opinion, it

[12] GRAY, *supra*, § 418. It is believed that, while it might be said that the trust provided for in Prichard *v.* Prichard, *supra*, is not executory, it is the kind of trust which the learned writer quoted believed to be invalid.
[13] Prichard *v.* Prichard, *supra*.

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